

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH HUANG and	:	CIVIL ACTION
JULIA Y. HUANG, h/w,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
BP AMOCO CORPORATION,	:	
Defendant	:	NO. 00-1290

Newcomer, S.J. January , 2002

M E M O R A N D U M

Presently before this Court are plaintiffs' Motion for Summary Judgment, defendant's Cross-Motion for Summary Judgment, and plaintiff's Motion to Compel. For the reasons set forth below, this Court denies all motions.

I. BACKGROUND

Plaintiffs bring the instant action claiming that defendant BP Amoco Corporation breached a lease between plaintiffs and Amoco Oil. At all times relevant, plaintiffs Joseph Huang and Julia Huang owned a continuous lot of commercial property located in Philadelphia, Pennsylvania. Pursuant to a written lease agreement between plaintiffs and Amoco Oil executed on September 21, 1998 (referred to by the parties as either "the Lease" or "the Ground Lease"), plaintiffs let said property to Amoco Oil for a term of fifteen years with a monthly rental of

\$6,666.66, escalating to \$7,455.66 in years ten through fifteen.¹

Under the Lease, defendant was allowed to improve and operate the property "for any lawful purpose including, but not limited to, a 'retail gasoline facility.'" A "retail gasoline facility" was defined by the Lease in Section 7(a) as follows:

[T]he term 'retail gasoline facility' shall include, without limitation, a twenty-four (24) hour motor fuel facility, . . . with kiosk, free-standing canopy, and twenty-four (24) hour automatic carwash, and twenty-four (24) hour convenience store, and twenty-four (24) hour quick-serve restaurant with drive-thru, or any combination of the foregoing suitable to Lessee in Lessee's sole discretion

According to the Lease, defendant was responsible for reaching any agreements with third-party co-developers, such as a quick-service restaurant or a convenience store operator, necessary to develop the property in accordance with the foregoing specifications for a "retail gasoline facility." Pursuant to the Lease, defendant also had sole discretion to negotiate those agreements and to determine whether those agreements were suitable.

In addition to the provision that defendant reach suitable agreements with third parties, the Lease included an "Approvals" contingency which allowed defendant 180 days from the

¹The Lease stipulated, however, that no rent was due until the date Lessee first sold gasoline from the premises, but not later than 90 days after all contingencies in Section 7 were satisfied or waived, all of the provisions of Section 8 were fulfilled, and the premises were delivered to Lessee free of possession and rights of possession.

date of execution to obtain certain "Approvals" (the "Approval period") in conjunction with any improvements on the premises. The term "Approvals," defined in Section 7(b) and used throughout the Lease, consisted of "such unconditional approvals and permits, including but not limited to signage and curb cuts," to be obtained "from the proper municipal, county, state, and other duly constituted authorities," "for the razing of improvements, construction of improvements and installation of equipment for a retail gasoline facility and for the operation and maintenance of such facility"

On April 19, 1999, Amoco sent plaintiffs a letter advising them of Amoco's intention to terminate the Lease pursuant to Section 7(c). Defendant had not, by that time, applied for the issuance of any Approvals. In the letter, defendant wrote: "Lessee has not obtained the Approvals required by Section 7 of the Ground Lease within the prescribed 180-day period as extended to April 20, 1999 by letter dated March 19, 1999 and acknowledged by you. Accordingly, pursuant to Section 7(c) of the Ground Lease, Lessee hereby exercises its privilege of terminating the Ground Lease." In addition, defendant had not yet paid any rent to plaintiffs, nor had any rent become due as of April 19, 1999.

Plaintiffs filed a Motion for Summary Judgment arguing that under the Lease defendant had a certain period of time

within which to obtain zoning and related municipal approvals for its proposed use of the leased premises. Plaintiffs contend that based upon defendant's admission that it made no effort whatsoever to seek the approvals or otherwise fulfill its alleged contractual obligation to do so, defendant breached the lease and must be held accountable for resultant damages to plaintiffs - in the amount of \$1,009,312.55, plus costs. Plaintiffs also claim that defendant failed to give proper notice of its termination.

Defendant filed a Cross-Motion for Summary Judgment arguing that the Lease was subject to several express contingencies which were left to the sole discretion of Amoco. Specifically, defendant asserted that the Lease gave either party the right to terminate if one or more of the contingencies specified in Section 7 were not satisfied. Allegedly, when it became clear to Amoco that some of these contingencies could not be satisfied, Amoco terminated the Lease in accordance with its terms. Regarding plaintiffs' notice argument, defendant argues that under the Lease it was not required to give notice of its termination. This Court granted defendant's Motion for Summary judgment which was reversed by the Third Circuit Court of Appeals. Currently before the Court is defendant's renewed Motion for Summary Judgment and plaintiffs' cross-motion as well as plaintiffs Motion to Compel Answers to Interrogatories.

II. SUMMARY JUDGMENT STANDARD

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Common, 826 F.Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's

case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. DISCUSSION

A. Defendant Amoco's Claims for Summary Judgment

The first of its four claims having been exhausted by the Court of Appeals, defendant Amoco renews its original Motion for Summary Judgment by arguing its remaining three claims: (1) plaintiffs failed to give defendant notice of the breach and time to remedy; (2) the plaintiffs accepted surrender of the property; (3) plaintiffs have failed to show any damages as a result of the alleged breach.

1. Notice and Opportunity to Cure

Defendant Amoco argues that even if it did breach, summary judgment should be entered in its favor as plaintiffs failed to give notice of default and a reasonable opportunity to cure said default as required by Section 26 of the lease. In answering this claim, plaintiffs point to a May 18, 1999 letter addressing the issue of default which was sent to the defendant. In rebuttal, the defendant contends that this letter did not constitute proper notice and failed to give the required time to cure as the plaintiff allegedly entered into another lease shortly thereafter. Summary judgment is clearly not warranted in such a situation. As described, the situation at hand is a classic question of material fact which needs to be answered by a finder of fact. Only a fact finder can complete the necessary steps in order to rule on such an issue, i.e., interpreting Section 26 of the lease, determining whether or not the May 18, 1999 letter constituted notice under the lease, whether an appropriate period of time was given to cure, etc. Therefore, defendant's Motion for Summary Judgment on this point is denied.

2. Surrender

The defendant also moves for summary judgment by arguing that through the subsequent lease of the property the plaintiffs accepted surrender of the property. An award of

summary judgment on this argument is also inappropriate. Similar to defendant's last argument, this claim must be heard by a fact finder. Ultimately, it is the fact finder who must determine whether the plaintiffs accepted surrender or simply took steps to mitigate damages after a unilateral breach by the defendant. An award of summary judgment on this claim would overstep the bounds of this Court and therefore defendant's motion on this claim must be denied.

3. Damages

Finally, defendant argues that the plaintiffs have failed to present evidence of damages and, consequently, summary judgment should be entered in the defendant's favor. To the contrary, plaintiffs have alleged damages comprised, among other things, of the difference between their expected income under the lease with defendant Amoco and the current lease with a third party. Whether or not a loss will truly be incurred is, once again, an issue of material fact to be determined by the fact finder. This Court denies defendant's third and final claim in its motion for summary judgment.

B. Plaintiff's Cross-Motion for Summary Judgment

1. Good Faith Effort.

Plaintiff cross-motions for summary judgment alleging that defendant Amoco fails to meet the burden of showing it acted

in good faith in its dealings with the plaintiffs. Despite plaintiff's claims this Court is unable to grant summary judgment under such a claim. The Court of Appeals clearly indicated, "[u]nder Pennsylvania law, whether a party has made a good-faith effort is a question of fact." Huang v. Amoco Corp., No. 00-3607, slip op. at 7 (3d Cir. filed November 8, 2001). Therefore, this Court will reserve such a question for the finder of fact.

C. Plaintiffs' Motion To Compel

Plaintiffs move this Court to compel defendant to answer its November 21, 2001 interrogatories and requests for production of documents. Defendant declined to answer said discovery requests arguing that this Court's previous scheduling order for discovery had expired. Defendant is correct. The discovery period expired on June 30, 2000, prior to this Court's granting defendant's prior Motion for Summary Judgment on July 14, 2000. Therefore, plaintiffs' motion is denied as additional time for discovery is not automatically given after an appeal when the preassigned discovery period closed prior to the appeal.

Accordingly, both parties' motions for summary judgment are denied. Plaintiffs' Motion to Compel is denied. An appropriate order will follow.

Clarence C. Newcomer, S.J.

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O R D E R

And now, this day of January, 2002, upon
consideration of defendant's Motion for Summary Judgment,
plaintiffs' Cross-Motion for Summary Judgment, and plaintiffs'
Motion to Compel, it is hereby ORDERED as follows:

- (1) Defendant's Motion for Summary Judgment is DENIED.
- (2) Plaintiffs' Cross-Motion for Summary Judgment is
DENIED.
- (3) Plaintiffs' Motion to Compel is DENIED.
- (4) A Final Pretrial Conference shall be held on March
14, 2002 at 11:15 AM. The parties shall be ready for trial on
this date.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.